

the question as to whether the judicial machinery had been run properly, whether any inadmissible evidence had been admitted, whether the jury had heard the cheers given to the prosecuting attorney by the crowd in the streets and so forth. And when finally the prisoner's lawyers were able to get the case before the most august tribunal in the world—the Supreme Court of the United States—that great Court forgot entirely the vital question of the guilt of the prisoner; the energy of its nine justices was expended on the question, should or should not the verdict of the jury be set aside because the counsel and judge had agreed that Frank should not be in court when the jury returned their verdict, and in accordance with this agreement he was in his cell in the jail at that time and received the news of it there instead of in court. And on this question, while the judges differed, a majority of them decided that it did not matter.

Here Justice received its second wound. The Supreme Court of the state learned that the trial judge was doubtful as to Frank's guilt, but it learned it in the wrong way. The trial judge expressed his doubt in the bill of exceptions, but failed to do so in his order, overruling the motion for a new trial. "Had he taken the latter mode of informing the Court of his doubt, the Supreme Court would certainly have granted a new trial. But since it was not put in that order under a technical rule of practice which is unbending in our Supreme Court, a new trial was denied, not because the doubt of the judge did not exist (for he certified to that himself in the bill of exceptions), but because he did not express that doubt in his written order rather than in the bill of exceptions."<sup>2</sup>

<sup>2</sup> 49 Am. Law Rev. 947.